No. 93-349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Respondent,

V.

ROYAL BUICK, INC.; BRIAN SMITH; EUGENE MARANO; RALPH RODRIGUEZ; EDWIN W. MUGFORD, III; DAVID ROEMER,

Petitioners.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI OF EDWIN W. MUGFORD, III

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QUESTIONS PRESENTED

I. IN THE ABSENCE OF OTHER GROUNDS FOR ADMISSIBILITY AND A LIMITING INSTRUCTION ON THE JURY'S CONSIDERATION OF THE EVIDENCE, WHETHER THE TRIAL COURT'S ADMISSION OF NINE CUSTOMER CREDIT APPLICATIONS PURSUANT TO RULE 803(6) OF THE FEDERAL RULES OF EVIDENCE IS REVERSIBLE ERROR WHERE THE SOURCE OF THE INFORMATION IN EACH OF THEM IS A THIRD PERSON NOT ACTING IN THE REGULAR COURSE OF THE BUSINESS WHO IS NOT CALLED TO TESTIFY, AND THE DOCUMENTS REPRESENT THE ONLY EVIDENCE AGAINST THE ACCUSED IN CRIMINAL COUNTS RELATED TO THE FALSIFICATION OF THE CREDIT APPLICATIONS?

II. WHETHER AN ACCUSED'S SIXTH AMENDMENT RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM ARE VIOLATED IN A CRIMINAL PROSECUTION CHARGING FRAUD INVOLVING THE FALSIFICATION OF NINE CREDIT APPLICATIONS WHEN THE GOVERNMENT FAILS TO CALL AS WITNESSES THE CUSTOMERS WHOSE SIGNED CREDIT APPLICATIONS ARE ALLEGED TO HAVE BEEN FALSIFIED AND THERE IS NO OTHER EVIDENCE PRESENTED THAT HE FALSIFIED THESE OR ANY OTHER CREDIT APPLICATIONS?

III. WHETHER AN ACCUSED'S CONVICTIONS FOR CONSPIRACY AND CRIMINAL FRAUD MUST BE REVERSED WHEN THERE IS NO DIRECT EVIDENCE OF HIS GUILT AND THERE IS STRONG AND REASONABLE EVIDENCE TO SUPPORT THE PRESUMPTION OF INNOCENCE?

United States v. ROYAL BUICK, INC.

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATION DISCLOSURE STATEMENT

First Union National Bank, Successor in interest to Florida National Bank, a victim

Hon. Wm. Terrell Hodges, United States District Judge

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OPINIONS BELOW

The Court of Appeals for the Eleventh Circuit did not render an opinion in this case, but on June 3, 1993, entered an Order affirming the convictions. A copy of the Order is attached in the appendix hereto, p. vi, *infra*. By Order entered August 6, 1993, the Court of Appeals denied Mugford's Suggestion for Rehearing *en banc*. A copy of the Order is attached in the appendix hereto, p. vi, *infra*.

No opinion was written by the United States District Court for the Middle District of Florida.

JURISDICTIONAL STATEMENT

This petition for certiorari is made pursuant to 28 U.S.C. § 1254 (1).

Jurisdiction for this appeal arises pursuant to 28 U.S.C.§ 1291, from a final judgment entered following trial and

conviction of appellant for violation of federal conspiracy and fraud laws in the United States District Court for the Middle District of Florida before the Honorable Wm. Terrell Hodges.

Jurisdiction arose in the district court pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

"No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

United States Constitution, Amendment VI, provides in pertinent part:

"In all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Mugford became employed as a salesman for Royal Buick in the spring of 1986. He was a recent college graduate. He began working for Royal Buick to learn the automobile sales business in anticipation of joining his father in the management of Royal Oldsmobile Company, a Richmond, Virginia automobile sales dealership. At that time, Royal Buick was owned and managed by a childhood friend of Mugford's father, Mr. Ralph Ghiotto. It was at his father's suggestion that Mugford sought employment with Ghiotto's company. (R42, pp. 5-22).

Edwin W. Mugford, III, along with other salesmen and sales managers of his former employer, Royal Buick, Inc., a Tampa, Florida automobile sales company, and a bank official, was tried by a jury for offenses charged in a superseding

federal grand jury indictment of numerous criminal counts involving fraud and conspiracy. The indictment generally alleged that the defendants, including the corporation, conspired to defraud Florida National Bank (a federally insured bank) by falsifying the credit applications of a certain class of customers who otherwise would not have qualified for used car loans. (Doc.No.301).

At the close of the government's case-in-chief, most of the charges against Mugford were voluntarily dismissed. The trial court denied Mugford's motion for a verdict of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure (F.R.Cr.P.). (R38, pp. 36-38, 136, 140-141, 143). The case continued against Mugford on the following counts:

> Count 1, general conspiracy. 18 U.S.C. § 371.

> Count 10, bank fraud involving the credit application of customer Shelby Pryor. 18 U.S.C. § 1344.
>
> Count 19, mail fraud involving the credit application of customer Samuel Caperton. 18 U.S.C. § 1341.
>
> Count 49, submitting a false loan application of customer Tracey Kenty to a federally insured bank. 18 U.S.C. § 1014.
>
> Count 50, submitting a false loan application of customer Jeffrey Mosley to a federally insured bank. 18 U.S.C. § 1014. (App., pp. xii-xxviii)

Mugford was acquitted on Count 50 (Doc. No. 600), and convicted of the remaining counts (Doc. No. 591).

On May 9, 1991, the trial court overruled Mugford's motion for judgment of acquittal and sentenced him to three years probation on the four counts and imposed a fine of $200.00. (App., p. x). Mugford timely appealed the convictions to the Court of Appeals for the Eleventh Circuit.(Doc. No. 664). On June 3, 1993,

that court affirmed the convictions without opinion. No petition for rehearing was sought. Mugford filed a Suggestion for Rehearing *en banc* on June 23, 1993. The Court of Appeals denied this petition and also denied a panel rehearing by Order entered August 6, 1993.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's finding that the business records exception to the Hearsay Rule permits admission of hearsay evidence when the party supplying the information was not acting in the regular course of business and there was no guarantee of the trustworthiness of the information directly conflicts with the construction of the Rule as stated in the decisions of this Court, other federal courts of appeal, and at the highest courts of at least two of the states.

Rule 803(6) of the Federal Rules of

Evidence does not permit the introduction into evidence of the expressed or implied hearsay statements of third parties contained in business records when "...the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Wilkerson stated that the source of the information in each of the credit applications at issue was the customer; and, by later implication, that the customer could misstate his credit history because most creditors did not report to the credit bureau and there was no means by which the salesman taking the information could verify it (R17, pp. 176-7; R18, p.12). Even after hearing this testimony, the district court allowed the Government to introduce into evidence under the 803(6) exception to the hearsay rule eleven credit applications in which Mugford was the named salesman.

This ruling was plain error. It was contrary to the Advisory Committee Notes (1987 Amend.) to Rule 803(6), the decisions of the federal courts of appeal for the Second, Fifth, Sixth, Seventh, Ninth and Tenth Circuits, and of the courts of last resort of the states of New York and Arizona.

Because the customer supplying the information in nine of the credit applications was not called to testify, those credit applications alone formed the basis for the convictions on appeal.

It is patently obvious the Government sought admission of the documents *en masse* to obviate the need to call each customer as a witness at trial and to establish by implication that Mugford falsified the credit applications.

However, having failed to convince the jury that Mugford falsified Mosley's

credit application, and later conceding that another defendant falsified Burns's credit application, the Government relies only on the nine remaining credit applications as "proof" that Mugford falsified the credit applications of Caperton, Pryor, and Kenty to support his convictions on substantive counts 10, 19 and 49, along with the other six credit applications to support the conviction for conspiracy. There is no legal precedence to support the use of the questioned documents for such a purpose under the facts in this case, and the cases cited in the Government's brief do not apply.

The admission of the documents[1] was

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[1] The documents in question are the credit applications contained in Government Exhibits 9, 41, 53, 285, 287, 289, 291, 293, and 295. The applications in Government Exhibits 3 (customer Hedrick Burns) and 7 (customer Jeffrey Mosley) are not subject to objection because these customers testified.

prejudicial error because it denied Mugford his fundamental right under the Sixth Amendment to confront the witnesses against him, and denied him due process under the Fifth Amendment because it reduced the government's burden to prove each and every element of the offenses charged beyond a reasonable doubt.

The Eleventh Circuit and the district court erred in refusing to reverse the convictions when, as a matter of law, the evidence created at most a mere

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At pages 29-32 of the Government's appellate brief (hereafter, this will be referred to as "GB"), the applications are discussed in detail. Mugford adopts the description of the false statements as described therein, but disputes that his convictions can be sustained on the basis of the fraud alleged in rebates and down payments shown on the credit applications for customers Pryor (53A), Johnson (285A), Delgado (291A), and Hartman (293A), because the evidence at trial was that the managers closed the loans and were responsible for those parts of the credit applications. (R19, pp.35, 36; R33, pp. 153, 154).

possibility Mugford falsified the nine credit applications in evidence about which the customers did not testify. The failure to reverse was prejudicial error and is contradictory to this Court's recognition in ***Sullivan v. Louisiana***, ___ U.S. _____, 113 S.Ct. 2078, 124 L.Ed.2d 182, 61 U.S.L.W. 4518 (1993) that the prosecution must prove all elements of the offense charged and must persuade the factfinder beyond a reasonable doubt of the facts necessary to establish each of those elements, and its holding in ***Ingram v. United States***, 360 U.S. 672, 79 S.Ct. 13, 14, 3 L.Ed.2d 1503, *reh'g denied* 361 U.S. 856, 80 S.Ct. 42, 4 L.Ed.2d 96 (1959), that convictions obtained by piling inference upon inference must be reversed.

ARGUMENT

I. IT WAS REVERSIBLE ERROR TO ADMIT THE

CUSTOMER CREDIT APPLICATIONS PURSUANT TO RULE 803(6)

Notwithstanding the Government's alternative arguments in its appellate brief (at pages 104-107) that 1) the credit applications were admissible pursuant to other hearsay exceptions, and 2) the credit applications were not hearsay because they were not admitted for the truth of the matters asserted therein, the trial court determined them to be hearsay and admitted them under the business records exception to the hearsay rule under Rule 803(6) of the F.R.Ev. (R17, p. 171). The only limitation the trial court placed on the use of the applications was that it would exclude those not within the time-frame of the alleged conspiracy. *Ibid.*

While Mugford does not dispute the admissibility of the Mosley and Burns

applications because the customers later authenticated these applications, admission of the remaining nine applications was reversible error. Without testimony from the customer authenticating them, those credit applications lacked the requisite "indicia of reliability," required for admission under a proper exception to the hearsay rule. *See,* ***Ohio v. Roberts***, **448 U.S. 56, 63, 100 S.Ct. 2531, 2539, 65 L.Ed 2d 597 (1980)** and cases recited therein.

This being the sole evidence against him, the error was not harmless. There was no other evidence linking Mugford to the conspiracy or to the falsification of the other two credit applications. Absent the improper admission of the applications, Mugford's convictions could not stand.

A. The Credit Applications Were Not Otherwise Admissible Under Any Exception to the Hearsay Rule

The Government contended on appeal that the documents would have been otherwise admissible under the following exceptions to the hearsay rule: 1) as statements of Royal Buick agents (801(d)(2)(D)); or 2) as statements of coconspirators (801(d)(2)(E)) (G.B. at 107). The appeals court apparently concurred in this analysis, but it is an incorrect application of the rules of evidence for the following reasons.

To begin, Rule 801 of the Federal Rules of Evidence defines the relevant terms applicable to the section on hearsay. Rule 801(a) defines "statement" as "(1) an oral or written assertion;" Rule 801(b) defines "declarant" as "a person who makes a statement;" and Rule 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing,

offered in evidence to prove the truth of the matter asserted." The terms so defined must be used in analyzing the proffered evidence to reach a determination as to their admissibility. Critical to the analysis of this case is who is the declarant in the questioned credit applications.

The Government contends Mugford is the declarant because his name appears on the face of the credit applications and in the other documents as the salesman. In making this assertion the government relies first on Wilkerson's testimony that the salesmen were instructed to write them from information supplied by the customer (R17, p. 177), and second, on the testimony of Wilkerson and others that employees of the dealership made false entries on them. (R21, pp. 36, 37; R27, pp. 207-210). The Government's own

evidence is insufficient to establish this premise for the following reasons.

Wilkerson's testimony that the *customer* supplied the information to the salesman imports that the customer is the person making the statement. By definition the person making the statement is the "declarant." F.R.Ev. 801(b). The document itself supports that conclusion because the customer signed each one attesting to the veracity of the information. This evidence shows the salesman is the mere scrivener of the customer's oral statement and is not the declarant.

Wilkerson's testimony and the testimony of others that managers and other employees of the dealership falsified the credit applications gives rise to an inference that someone other than the customer may be the declarant of the false information. But there was no

evidence that Mugford falsified those in evidence.

His name as the salesman on the credit applications does not alone identify him as the declarant or scrivener. *See,* ***United States v. Lieberman***, 637 F.2d 95 (2d Cir.1980) [absent proof of independent verification by hotel employee, guest registration card not admissible under business records exception to hearsay rule to prove person named therein was the defendant though it was admissible to prove someone using defendant's name registered at hotel on that date]. No testimony established it was the regular practice of Royal Buick to verify that the salesman shown on the credit application was the salesman handling the transaction, though there was other evidence establishing salesmen sometimes wrote up applications using

another's name. (R27, pp. 207-210).

No customer testified that Mugford was the salesman on any of the nine transactions in issue. No handwriting expert or other person familiar with Mugford's handwriting was called to testify Mugford wrote the applications in question.

To the contrary, as to one of the credit applications not at issue here, the government's own witness testified that the only false entries (Ward's and VISA) on Hedrick Burns' credit application was in the handwriting of defendant Rick Taylor, although Mugford was shown on the face of the application as the salesman. (Gov't Exhibit 3A; R33, pp. 194, 195).

Since it failed to prove Mugford was connected to the credit applications, and there was no other evidence (foundation or otherwise) of his participation in the

conspiracy alleged, the Government failed to establish the admissibility of the documents under either the 802(d)(2)(D) and (E) exceptions, or under any other exception to the hearsay rule.

B. *The Documents Contained Hearsay That the Government Used to Mugford's Detriment*

However, confusion abounds in the record and in the Government's brief as to the purpose for which the credit applications were introduced. In addition to the 802(d) exceptions, the Government states the credit applications were admissible as non-hearsay because they were not introduced for the truth of the matters asserted, but merely to establish that statements relating to the customer's financial condition and credit history were made which the Government, though other evidence showed to have been false.

Taking the Government at its word,

the argument has merit only if the credit applications were used for that purpose and if the documents tend to prove an essential element of the crime charged. But the Government's argument is flawed because the documents were used not only to prove an essential element of the crime, but also to prove Mugford was the person committing the crime.

In no less than three instances in its appellate brief, the Government admits the disputed credit applications were necessary to prove Mugford's participation in the conspiracy (G.B. at 60), his responsibility for the nine false loan applications (G.B. at 61), and that they "were the most significant documents in the files, those needed to prove the fraudulent offenses." (G.B. at 108).

For the reasons previously stated above, the documents themselves were

insufficient to identify Mugford as the declarant of the false statements in them. There was no foundation laid to link him to the credit applications before their introduction so they were not probative evidence of his participation in the conspiracy alleged or of criminal conduct on his part.

Had the Government sought the admission of the documents for the non-hearsay purpose stated, it would have deleted Mugford's name from them until such time as it laid a foundation to link him to the questioned falsifications. Rather, by admitting the applications without deleting his name the Government used them not only to demonstrate a false entry was contained in them but also to prove Mugford was the person who falsified them.

While the credit applications may

have been relevant to demonstrate that each contained one false entry, they were not relevant to prove the declarant was Mugford without other evidence linking him to the false statements.

That the Government was aware of the necessity to offer independent evidence of Mugford's authorship of the false information to the questioned credit applications is demonstrated by its attempts to link him to the false statements in the Mosley and Burns credit applications through the testimony of those customers.

Mosley (whose credit application formed the basis for Count 50) was called first to offer evidence against Mugford. He was unable to identify Mugford as his salesman by face or proper name, although he testified immediately before he failed to make an in-court identification that he

recalled what his salesman looked like and could identify him. (R33, p. 20). On examination by Mugford's counsel, Mosley was so discredited as a witness that the jury acquitted Mugford on the charges in Count 50.

The other customer called by the Government to link Mugford to a false credit application was Hedrick Burns. He was unable to properly identify Mugford by name and was not even asked to attempt an in-court identification. Like Mosley, Burns' testimony was discredited upon examination by the defense. As a result of Burns' poor testimony and the testimony of coconspirator Glasgow (R33, pp. 194, 195), the Government's attorney conceded in his closing argument to the jury that the false information on the Burns application was not Mugford's work, but was placed on the credit application by codefendant Rick

Taylor. (R44, pp. 43, 44).

As in the instances of Mosley and Burns, the remaining credit applications in issue merely indicate, not identify, Mugford as the salesman in the transactions. They do not, by themselves, prove him to be the declarant of the false information contained in them. But that was the purpose for which the Government used their admission.

In the apparent belief that the whole is greater than the sum of its parts, the Government sought to admit the credit applications *en masse* to accomplish what it failed to achieve through the testimony of Mosley and Burns; to-wit, the identification of Mugford as the person falsifying the credit applications. Somehow, nine disputed documents were to buttress each other as a substitute for the lack of other evidence necessary to

authenticate the individual documents. The use of the nine applications to identify Mugford as the perpetrator of the crimes alleged refutes the Government's claims that they were not offered for the truth of the matters asserted.

C. *Because They Did Not Meet The Threshold Requirements of The Business Records Exception The Credit Applications Were Inadmissible*

Although the Government made no proffer for the intended use of the documents when objections were made to their introduction, it is obvious the court determined them to be hearsay because it admitted them pursuant to the 803(6) exception to the hearsay rule. In actuality, the documents contained two levels of hearsay.

The first level of hearsay was the information in them was contained in Royal's records. Apparently, this would be

admissible under the 803(6) exception to the hearsay rule if its relevance was shown to the prosecution's case. As discussed above, the dual use made of them by the Government primarily was to show by implication that Mugford was the declarant who falsified the credit applications. Standing alone they were not relevant for that purpose.

However, the second level of hearsay was that of the customer's assertion, implied from the manner in which the Government presented its case, that the false information was from someone at the dealership rather than the person supplying the information to the dealership. By not calling the customer to testify about the credit application, the jury was allowed to improperly infer that the customer was without fault.

This is not the law and its use in

this manner flies in the face of the personal protections underlying the hearsay rule. The various exceptions to the hearsay rule permit the introduction of hearsay provided the evidence falls within a class deemed reliable. Among the highly regarded exceptions is the business records exception because in traditional settings the hearsay is reliable. But not all business records qualify.

In applicable part, Rule 803(6) provides that the admission of records kept in the regular course of a business are not excluded by the hearsay rule

> ". . . unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."

A fair reading of the 803(6) does not indicate that if the questioned document meets a part of the qualification for admission, then the trial court may admit

the document. Rather, the exception imports that the trial judge determine that all requisite factors are met to insure its veracity and reliability. To hold otherwise frustrates the purpose and intent of the Rule, which is to permit the admission of evidence not otherwise admissible as hearsay.

The Second Circuit noted 16 years ago, Rule 803 is "...*not* designed to insure the *admissibility* of the questioned evidence [but] only designed to prevent its automatic exclusion on hearsay grounds," *United States v. Oates*, 560 F.2d 45, 65 (2d Cir.1977), *aff'd.*, 591 F.2d 1332 (1978). There has been no shift in the law on that concept in the interim. Stated in other words, as to hearsay evidence the business records exception is a sieve, not a floodgate.

By upholding Mugford's convictions

the Eleventh Circuit determined hearsay evidence to be admissible even when the most basic prerequisites of the applicable exception have not been met. This marks an unprecedented departure not only from the plain language of the law, but also from the Advisory Committee Notes to Rule 803(6) [2] and the decisions of the courts of appeal of the other federal judicial circuits and state courts which have

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[2] In relevant part, the Advisory Committee [1987 Amend.] notes as follows:

> Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short, "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may have been recorded with scrupulous accuracy is of no avail.

considered this question. [3]

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[3] *See*, ***Wilson v. Zapata Off Shore Co.***, 939 F.2d 260, 271 (5th Cir.1991) [hospital record not admissible under Rule 803(6) because it contains double hearsay where the source of the information is an outsider and therefore the record does not have the presumption of accuracy that documents prepared in the regular course of business have]; ***Datamatic Services, Inc. v. United States***, 909 F.2d 1029, 1032-33 (7th Cir.1990) [where source of information in letter was outsider Rule 803(6) does not by itself permit the admission of a business record]; ***United States v. Bortnovsky***, 879 F.2d 30, 34 (2d Cir. 1989) [although insurance adjuster's report might otherwise qualify as business record within meaning of 803(6), third party's statement contained therein does not satisfy the rule's requirements because there was no showing that source had a duty to report the information that he was quoted as having given]; ***United States v. Snyder***, 787 F.2d 1429, 1433-34 (10th Cir.1986), *cert. denied*, 479 U.S. 836, 107 S.Ct. 134, 93 L.Ed.2d 78 (1986) [statements of inmates incorporated into police officer's report bars admission of the report because statements not entitled to presumption of reliability and regularity accorded a business record and introduction of inmates' statements would impermissibly insulate them from the test of cross-examination]; ***United States v. Pazsint***, 703 F.2d 420, 424-25 (9th Cir.1983) [tapes of emergency calls not admissible though made in the regular

(continued...)

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[3](...continued)
course of business because callers under no business duty to report and cannot be given the presumption of reliability and accuracy]; ***Clark v. City of Los Angeles***, 650 F.2d 1033, 1037 (9th Cir.1981), *cert. denied*, 456 U.S. 927, 102 S.Ct. 1974, 72 L.Ed.2d 443 (1982) [diary replete with hearsay and multiple hearsay not independently admissible is not otherwise admissible under business records exception to hearsay rule]; ***United States v. Lieberman***, 637 F.2d 95, 100-101 (2d Cir.1980) [while hotel guest registration card was admissible to show someone representing himself as defendant registered at hotel on particular date, absent proof that it was regular course of business of hotel employee to independently verify such information, registration card not admissible to show defendant was the person named]; and ***United States v. Yates***, 553 F.2d 518, 521 (6th Cir.1977) [finding that part of letter not within business records exception because it contained statement outside the scope of business]. *See also*, ***Hoffman v. Palmer***, 129 F.2d 976, 980 (2d Cir.1942), *aff'd*, 318 U.S. 109, 63 S.Ct. 757, 87 L.Ed. 645 (1942), *and reh'g denied*, 318 U.S. 800, 63 S.Ct. 757, 87 L.Ed. 1163 (1943) [deceased train engineer's statement contained in employer railroad's memorandum of interview of him relative to accident not admissible under common law business records exception to hearsay rule where it appears source of information had more than minimal or

(continued...)

While the trial court did inquire of the testifying witness if the records were of the type normally maintained in the regular course of Royal's business (R17, pp. 170, 171), it failed to make the second inquiry necessary to determine if either the source of the information indicated a lack of trustworthiness or if the method or circumstances of preparation indicated a lack of trustworthiness. Rule 803(6). Inherent in this determination was

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[3](...continued)
marginal motive to misrepresent]; *Johnson v. Lutz*, 253 N.Y.124, 127-28, 170 N.E.2d 517 (1930) [police officer's accident report incorporating bystander's statements not admissible under business records exception to hearsay rule because bystander under no business duty to report]; and *State v. McGann*, 132 Ariz. 296, 645 P.2d 811, 813-814, at footnote 1 (1982) [customers' statements that their signatures on credit card receipts were not authorized, whether shown directly by the statements in the records by oil company's business practices, barred admission of oil company records business record under state's evidence rule 803(6)].

the trial judge's duty to be satisfied that the source of the information, the customer, had "no particularly powerful motive to misrepresent." ***Hoffman v. Palmer***, ***supra.***, **129 F.2d at 980.** One need look no further in the record than Wilkerson's testimony to conclude that the credit applications satisfied neither requirement, and the trial court failed to make the necessary inquiries.

The defendants' *voir dire* of Wilkerson bears scrutiny because it raises serious questions as to his qualification as the witness through which the documents could be admitted. He testified he "had access" to all the files, but was only familiar with those representing his personal sales transactions. He admitted he was not the custodian of the records, and had left the employment of Royal Buick in 1988, more than two years prior to his

testimony (R17, pp. 166-171). Mere access to business records and familiarity with them is not sufficient to qualify a witness for the introduction of business records. *See, United States v. Porter*, 821 F.2d 968, *cert. denied*, 485 U.S. 934, 108 S.Ct.1108, 99 L.Ed.2d 269; and *cert. denied by Bell v. United States, 485 U.S. 934, 108 S.Ct. 1108, 99 L.Ed.2d 269 (1988)* [security officer having access to files of closed company not a qualified witness for introduction of company's personnel cards because he did not work in personnel office and was not familiar with company's record keeping requirements].

After the court admitted the documents it was learned through Wilkerson the source of the information in the credit applications was the customer, not the person writing it or another employee of Royal Buick. The foundation thus laid

by Wilkerson for admission was that the customer supplied the information in them and the salesman wrote what the customer related (R17, pp. 176, 177). He failed to state that the salesmen taking the information had a duty or the means to verify the information. Wilkerson's testimony also indicated the types of customers targeted by the "Betty Moses" program were those having bad credit or poor credit histories (R18, p. 20).

That foundation testimony established that the source of the information in each of the credit applications was a person acting outside the scope of the business and not an employee having a duty to report accurately; and, who, because they wanted to purchase a car and had bad or poor credit, possessed an obvious motive to lie.

Given that testimony, the trial court

was required by the plain language of Rule 803(6) to exclude the credit applications for two reasons: first, because the source of the information was not acting in the regular course of business; and second, because the methods or circumstances of preparation indicated a lack of trustworthiness.

The trial court disregarded these factors in making its evidentiary ruling, relying instead on the testimony that it was the regular practice of the business to keep such records. (R17, p. 171).

Notwithstanding that the defense objection to admission of the credit applications did not address specifically these arguments,[4] the court's ruling was

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[4] By pre-trial order and agreement of the several defense counsel, counsel for Royal Buick was designated by the court as lead counsel for purposes of making objection. Current counsel did not represent Mugford at the trial.

plain error having a devastating effect on Mugford's defense.

In this criminal prosecution for fraud the ultimate jury question was who was the person making the false statement, the person writing the information (the salesman) or the declarant supplying it (the customer). The government expressed no intent to call the nine customers, nor did it offer explanation that the customer was unavailable to testify. The testimony of the foundation witness was at best equivocal as to the source of the information in the documents. The records themselves do not reveal the identity of the author of the false information. Under such circumstances the records are without probative value absent corroborative evidence to show the defendant authored the falsities. For these reasons that evidence should have been excluded.

Review of a recent Arizona Supreme Court decision evaluating a similar fact pattern illustrates the problems created by the liberal construction of the business records exception applied by the trial court in this case.

In *State v. McGann*, 132 Ariz. 296, 645 P.2d 811, 813-14, (1982), McGann was convicted on each of four counts charging he had forged the signature of a customer of the gasoline service station where he worked to obtain the cash equivalents for those charges. Faced with a very similar set of facts on appeal, the Arizona Supreme Court reversed the appellant's fraud convictions because the trial court improperly admitted hearsay evidence fundamentally damaging to the rights of the accused. The complaining customer involved in the four counts in the indictment testified at trial that the

signatures on the four questioned credit card receipts were not his, nor authorized by him.

However, 57 credit card receipts of three other customers who did not testify were admitted through the service station owner, who testified that pursuant to its usual business practice, the oil company back-billed him for the charges evidenced by those receipts upon the customers' representations that the signatures were unauthorized. At footnote 1 to the opinion, the Arizona Supreme Court said:

> It could be argued that the evidence of the back-billing by Chevron fits within the business records exception of Rule 803(6).[5] The exception does

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[5] The source of Arizona Rules of Evidence 803 is Rule 803 of the Federal Rules of Evidence. The business records exception is essentially identical to Rule 803(6) of the federal rules. The text follows:

> (6) Records of regularly conducted
> (continued...)

not apply in this case for two reasons. First, the station manager was not a custodian of Chevron's records or an otherwise qualified Chevron employee as required by Rule 803(6)(e). Second, the evidence

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[5](...continued)
activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if: (a) Made at or near the time of the underlying event, (b) by, or from information transmitted by, a person with first hand knowledge acquired in the course of a regularly conducted business activity, (c) made and kept entirely in the course of that regularly conducted business activity, (d) pursuant to a regular practice of that business activity; and (e) all of the above are shown by the testimony of the custodian or other qualified witness.

However, such evidence shall not be admissible if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness or to the extent that portions thereof lack an appropriate foundation.

The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

> involves two levels of hearsay, and the second does not fit within the exception. Chevron's records are the first level of hearsay. The fact that Chevron's records show that the station manager was back-billed is within the business records exception.
>
> *But customers' statements that their signatures were unauthorized, whether shown directly by the statements in the records or by inference from Chevron's business practices, constitute a second level of potential hearsay. . . In the instant case, the effect of the station manager's testimony was to introduce the out-of-court statements of [the customers who did not testify] to Chevron to prove that their signatures were not authorized. The taint of hearsay is not dissipated merely because they are contained in business records. The testimony was hearsay not within the business records exception.* [emphasis added]

Though not apparently required to do so to reach its conclusion, the Arizona Supreme Court sagely interpreted the business records exception exactly as the trial court should have done in Mugford's case.

It is obvious in this case the trial court failed to make the proper ruling and

the court of appeals failed to reverse it. As a result, Mugford was convicted on this erroneously admitted evidence because the jury was allowed to rely upon it to improperly infer the customers' statements would be that they did not lie to Mugford.

II. THE IMPROPER ADMISSION OF THE NINE CREDIT APPLICATIONS DENIED MUGFORD HIS FUNDAMENTAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM IN VIOLATION OF THE SIXTH AMENDMENT

Under the authority of *McDaniel v. United States*, 343 F.2d 785 (5th Cir.1965), *cert. denied*, 382 U.S. 826, 86 S.Ct. 59, 15 L.Ed.2d 71 (1965), the trial judge was required before making his evidentiary ruling on the admissibility of the credit applications "to determine in each instance whether such documents are constitutionally admissible under the Sixth Amendment guarantee of

confrontation."[6] The record is bare the trial court made such a determination except to the extent that he permitted them to come in under the 803(6) exception to the hearsay rule.

The Sixth Amendment to the Constitution guarantees an accused the right to confront the witnesses against him. In pertinent part it provides

> "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In the convictions subject to this appeal, the sole "witnesses" against Mugford were the credit applications. Not one customer testified that Mugford, rather than the customer himself, was the source of the false information in the credit

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[6] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), the Eleventh Circuit adopted as binding all decisions of the Fifth Circuit made prior to the close of business September 30, 1981.

application at issue. As specifically explained in the preceding section of the brief, those documents, *even if they were properly admitted*, were insufficient evidence to support the convictions because the source of the information was not shown by other evidence to be Mugford.

But because the credit applications were improperly admitted, the Government did not have to call the customers as witnesses. Rather, the court's ruling wrongfully permitted the Government to convey to the jury two implications of fact not supported by the evidence in the case: 1) that because none of the customers was charged with any crime the Government had concluded from its investigation that the customers were not the sources of the false information in the credit applications; and, 2) had they been called to testify, each customer

would deny he authorized the false statements in the credit applications.

In effect, the Government's burden of proving the necessary elements of each of the crimes charged which related to the nine questioned credit applications was substantially reduced, if not entirely eliminated. Although the testimony of its own witnesses established that the sources of the false information could be the customer (R17, p. 177), another salesman (R27, pp. 207-210), a sales team leader or manager (R21, pp. 36, 37; R33, pp. 194, 195), and not necessarily the salesman shown on the application itself, the use of the credit applications without a limiting instruction or the need to call the customer to authenticate it, identify the salesman, and testify as to the source of the false information under cross-examination, was plainly wrong. The

Government could (and did successfully) wave the nine credit applications before the jury, point to the false information each contained, and argue that the documents alone proved Mugford guilty of the three substantive counts and the conspiracy count charged.

As previously stated herein, the Arizona Supreme Court in *McGann*, *supra.*, alertly recognized the "fundamental error" ("error as goes to the foundation of the case, or which takes from the defendant an essential right," 645 P.2d at 813) posed by the wrongful use of the business records hearsay exception in such a manner as affords the jury to consider the implied statements of third parties which are contained in business records:

> "...The effect of the station manager's testimony was to introduce the out-of-court statements of [the customers] to Chevron to prove that their signatures were not

> authorized." 645 P.2d at footnote 1, p. 814.

The fundamental right referred to, though not specifically stated in the opinion, was the right to confront the witnesses on the issue of whether their signatures were authorized by them. This is exactly the issue posed in this appeal.

This Court has long acknowledged that the "the hearsay rules and the Confrontation Clause are generally designed to protect similar values." *California v. Green*, 399 U.S. 149, 155, 90 S.Ct. 1930, 1933, 26 L.Ed.2d 489 (1970). The Confrontation Clause "was intended to exclude some hearsay * * * [and] reflects a preference for face-to-face confrontation at trial." *Ohio v. Roberts*, 448 U.S. 58, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980), *citing Green, supra.*, 399 U.S. at 157, 90 S.Ct. at 1934 ["it is

this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"] and *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Quoting *Mattox v. United States*, 156 U.S. 237, at 242-243, 15 S.Ct. 337, at 339, 39 L.Ed. 409 (1895), the *Roberts* opinion continues: "In short, the Clause envisions

> 'a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but also of compelling him to stand face to face with the jury so they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'" 448 U.S. at 63-64, 100 S.Ct. at 2536-2537.

The search for truth underlies this right of an accused to confront those whose words would serve to deny him personal

liberty and stain his name.

However, exceptions exist. In the general case when a hearsay declarant is not present for cross-examination at trial, his prior statement can be admitted if there is a required showing that he is unavailable and if his statement bears "adequate 'indicia of reliability'." *Id.*, at 2539. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*

But in this case the evidence was improperly admitted outside a "firmly rooted hearsay exception." The source of the information was not acting within the scope of employment and possessed a strong motivation to misrepresent his credit

history and financial status to qualify for a car loan. The business records exception was therefore wrongfully applied as the basis for admission of the credit applications, and no other hearsay exception applied to permit their introduction.

This is unlike the cases decided by this Court which have allowed hearsay evidence to be considered under circumstances in which the hearsay was clothed with adequate indicia of reliability.

For instance, in *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), the confrontation issue arose "because the jury was being invited to infer that [the non-testifying declarant,] Williams had implicitly identified Evans as the perpetrator of the murder when he blamed Evans for his predicament [in a

statement made to Shaw, who did testify]." *Id.*, 400 U.S., at 88, 91 S.Ct., at 219. This is not unlike the Government's use of the credit applications here to invite the jury to infer Mugford was the person falsifying the credit applications, rather than the customer or someone else. While this Court in *Dutton*, found there were at least four factors surrounding the circumstances of Williams' statement to Shaw to clothe it with "indicia of reliability," 400 U.S., at 89, 91 S.Ct., at 219-220, to properly place it before the jury without confrontation of the declarant, no such circumstances exist in this case to render the implied statements of the customers "adequately reliable." The admission of the credit applications without customer testimony radically departs from the prior decisions of this Court which "make it clear that the

mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact has a satisfactory basis for evaluating the truth of the prior statement.'" *Id.*, *quoting*, *California v. Green*, 399 U.S., at 161, 90 S.Ct, at 1936.

In fact, no better example of the effectiveness of cross-examination to ferret out the truth, nor the injustice that results when the right is impugned by judicial error, exists than in the matter now before this highest Court.

Only two of the eleven customers whose credit applications were in evidence against Mugford were called: Mosley and Burns. The Government made no representation that the other nine were unavailable. Because the Government called no other customers whose credit

applications showed Mugford to be the salesman, it must be inferred that these two witnesses represented, in the Government's opinion, the strongest testimony available to prove Mugford falsified customer credit applications.

When Mugford was afforded his constitutional right to "test the recollection and sift the conscience" of these witnesses, he was proved not guilty of fraud. Neither customer Mosley nor customer Burns could identify him as the salesman in their transactions, neither of them could properly recall his name, and each was shown by other evidence presented in Mugford's defense to have lied to the jury on direct examination.

The jury, being afforded the opportunity to "look at [Mosley] and judge by his demeanor upon the stand and the manner in which he [gave] his testimony

whether he [was] worthy of belief," did not judge him well. Mosley was found by them not to be "worthy of belief" and the jury acquitted Mugford of the charges in Count 50.

Although the credit application of Burns did not figure in a substantive count of the indictment, it did have value to the Government's case as to the conspiracy charge. But as a witness to Mugford's wrongdoing, Burns fared no better than Mosley. His testimony was so discredited on cross-examination the Government conceded in its closing argument to the jury that Mugford did not put the false information on the Burns credit application, Taylor did. (R44, pp. 42, 43).

As to the remaining nine credit applications, no other customer testified, including those whose credit applications

were the basis for the substantive counts of mail fraud, bank fraud and submitting a false loan application to a federally insured bank. No coconspirator, indicted or unindicted, testified Mugford either knew of the conspiracy or participated in it.

Given the opportunity to confront the nine other customers in open court, Mugford may have been able to discredit their evidence as he was able to do with Burns and Mosley. But because he was denied this fundamental right of confrontation, Mugford, an innocent man, was convicted of crimes he did not commit.

III. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTIONS FOR FRAUD AND CONSPIRACY

In order to prove Mugford guilty of the three remaining substantive fraud counts and the conspiracy count the

Government had to prove all elements of each offense charged and persuade the jury beyond a reasonable doubt of the facts necessary to establish each of those elements. *Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, _____ L.Ed.2d ____ (1993). Although the proof may be by direct evidence or by circumstantial evidence, *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), *reh'g denied*, 348 U.S. 932, 75 S.Ct. 334, 99 L.Ed. 731 (1955), it must be sufficient to overcome the presumption of innocence to which each person is entitled under the Due Process Clause of the Fifth Amendment to the Constitution. The evidence does not have to exclude every hypothesis of innocence, or be inconsistent with every reasonable hypothesis except guilt, but "if a [*sic*] hypothesis of innocence is sufficiently

reasonable and sufficiently strong, then a reasonable trier of fact *must* necessarily entertain a reasonable doubt about guilt." ***United States v. Bell***, 678 F.2d 547, 550 (5th Cir. 1982)[7], *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 74 L.Ed.2d. 638 (1983). Moreover, a conviction cannot stand if it is based "by piling inference upon inference." ***Ingram v. United States***, 360 U.S. 672, 680, 79 S.Ct. 1314, 1319, *quoting* ***Direct Sales Co. v. United States***, 319 U.S. 703, 711, 63 S.Ct. 1265, 1269, 87 L.Ed. 1674 (1943).

Having successfully rebutted the Government's evidence presented through the testimony of Burns and Mosley that he was the source of the false information on their credit applications, the sole evidence against Mugford was the credit

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[7] Special concurring opinion of Judge Anderson, joined by Judge Roney.

applications of the customers who did not testify. Even when viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U. S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the evidence fails to establish facts sufficient to permit a reasonable trier of fact to infer that Mugford falsified any of the credit applications in evidence or that he was a voluntary participant in the conspiracy.

No evidence was adduced at trial to link Mugford to any wrongdoing. No witness testified Mugford was aware of, or participated in, the conspiracy alleged. No customer identified him as being the salesman in any of the transactions charged in the indictment. No one identified his handwriting as being on any of the credit applications in evidence. His name appearing on the face of the credit applications is alone insufficient

to prove, either directly or by implication, that Mugford had any involvement in the transactions. ***United States v. Lieberman***, *supra*. In summary, there was absolutely no fact in evidence to prove Mugford falsified any credit application or voluntarily joined in the conspiracy alleged.

Given the absence of direct evidence to support them, one must conclude Mugford's convictions in the four counts only could be the result of the jury improperly "piling inference upon inference."

To reach such a conclusion the jury would first have had to infer that Mugford was the salesman in the credit transactions in questions. There was no fact in evidence to establish this inference.

The jury then would have had to infer

that Mugford put the false information on the credit applications. There was no fact in evidence to support this inference. To the contrary, there was evidence to conclude Mugford did not put any false information on any credit applications, as was demonstrated in the Mosley and Burns transactions.

In order for the convictions of bank fraud of this type to stand the Government had to prove beyond a reasonable doubt Mugford knowingly made a false statement to a financial institution. *See, United States v. Thompson*, 811 F.2d 841 (5th Cir.1987). Although the Government's evidence did sufficiently prove that some employees of Royal Buick conspired with one another and with an officer of Florida National Bank in conduct defrauding the bank, Mugford's mere business association with them is insufficient to sustain his

convictions. *See*, ***Canning v. United States*** 119 F.2d. 130 (9th Cir.1941); ***United States v. Grassi***, 616 F.2d 1295 (5th Cir.1980), *cert. denied*, 449 U.S. 956, 101 S.Ct. 363, 66 L.Ed.2d 220 (1980).

In a case very similar to that of Mugford's the Fifth Circuit reversed the conspiracy convictions due to insufficiency of the evidence. Determining the questioned conduct upon which the charges were based could be legal or illegal, the court reasoned the Government must prove both a departure from the legal conduct, and an agreement and overt act in furtherance of the illegal objective. "It is not enough for [the Government] to merely establish a climate of activity that reeks of something foul." ***United States v. Weischenberg***, 604 F.2d 326, 332 (5th Cir.1979). The Government's evidence against Mugford failed in those aspects.

In this case, Mugford was at all relevant times employed as a car salesman, a legal occupational pursuit. Albeit the Government proved some of his co-workers departed from that legal activity to engage in illegal conduct, that is not a sufficient basis in law to conclude beyond a reasonable doubt that Mugford did likewise. It is not the conduct or pattern of fraud proved against his co-workers that is at issue, but the pattern of conduct of Mugford that controls this case.

That the jury had reasonable doubt that Mugford joined the conspiracy alleged and falsified the credit applications of customers is evidenced by its not guilty verdict in Count 50 involving customer Mosley. When, as here, the facts adduced at trial establish at most a mere probability that the defendant committed

the crimes charged, a reasonable jury must find him not guilty. ***Wieschenberg***, **604 F.2d, at 332 and 335** ("evidence that establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction on appeal * * * juries 'must not be permitted to convict on suspicion and innuendo'").

Because the Government failed to meet its burden of proof against Mugford on the counts charged, all his convictions must be reversed.

CONCLUSION

An evidentiary ruling that permits the implied hearsay of third parties contained in business records to be considered by the jury is plainly wrong and is fundamental error so prejudicial to the accused that his convictions based thereupon must be reversed. The confusion the Eleventh Circuit exhibits in its decision in this case, coupled with its conflict with similar cases decided in other federal circuits, requires this Court's intervention and resolution of the issue.

The error is compounded when the wrongful admission of the evidence denies the accused his fundamental right to confront and cross-examine his accusers, nor allows the jury to judge their credibility, and ultimately has the effect of reducing the Government's burden of

proof of the crimes charged.

Notwithstanding these factors, when the jury has expressed reasonable doubt of guilt in the face of the Government's best evidence against the accused, and the Government has failed to link the accused by either direct or circumstantial evidence to the criminal fraud charged, a reasonable jury must find reasonable doubt of his guilt to the remaining charges.

EDWIN W. MUGFORD, III

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APPENDIX

Order dated June 3, 1993 vii

Order dated August 6, 1993 viii

Order dated May 9, 1993 x

Superceding Indictment xii

Federal Rules of Civil Procedure . xxix

Title 18 U.S.C. xxxii

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-3486

D.C. Docket No. 90-20-CR-T-10A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus,

ROYAL BUICK, INC.,
DAVID ROEMER,
BRIAN SMITH,
RALPH RODRIGUEZ,
EDWIN MUGFORD, III,
EUGENE MARANO,

Defendants-Appellants.

Appeals from the United States
District Court for the
Middle District of Florida

(June 3, 1993)

Before FAY and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

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*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-3486

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus,

ROYAL BUICK, INC.,
DAVID ROEMER,
BRIAN SMITH,
RALPH RODRIGUEZ,
EDWIN MUGFORD, III,
EUGENE MARANO,

Defendants-Appellants.

On Appeal from the United States
District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion June 3, 1993, 11th Cir., 19__, ____F.2d____).

Before: FAY and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eight Circuit, sitting by designation.

UNITED STATES DISTRICT COURT

x

MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

JUDGEMENT IN A CRIMINAL CASE
Case No.: 90-20-CR.T-10(A)

EDWIN W. MUGFORD, III
10209 Swinging Bridge Dr.
Richmond, Virginia 23222

SSN: 230-17-0382

(Name and Address of Defendant)

THE DEFENDANT ENTERED A PLEA OF:

__ guilty nolo contendere as to count(s) _____.
and
__ not guilty as to count(s) _____.

THERE WAS A:
__ finding x verdict of guilty as to count(s) 1, 10, 19, and 49 .

THERE WAS A:
__ finding __ verdict of not guilty as to count(s) _____.
__ judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

COUNT 1: Conspiracy to Defraud a Federally

Insured Financial Institution, 18 USC 371.

COUNT 10: Bank Fraud, 18 USC 1344.

COUNT 19: Mail Fraud, 18 USC 1341.

COUNT 49: False statements in the making of a loan Application, 18 USC 1014.

IT IS THE JUDGMENT OF THIS COURT THAT: IMPOSITION OF SENTENCE is suspended and defendant placed on probation for a period of THREE (3) YEARS as to Counts 1, 10, 19, and 49. Concurrently,and under the terms and general conditions of probation appearing on the reverse side of this judgment.

[EXCERPTS FROM]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	CASE NO.
	:	90-21-Cr-
ROYAL BUICK, INC.	:	T-10(A)
BRIAN SMITH,	:	
RICK TAYLOR,	:	
KATHLEEN GERMAN,	:	
JOSEPH GLASGOW,	:	
VICTOR NOEL CHRISTMAS,	:	
JERRY WALKER,	:	
RALPH RODRIGUEZ,	:	
JOSEPH SCARBOROUGH,	:	
LEE TYLER,	:	
JOHN DELOACH, JR.	:	
THOMAS MCCARTHY,	:	
MICHAEL MCMILLEN,	:	
DAVID ROEMER,	:	
MARK MEARS,	:	
KEVIN SCOTT,	:	
EDWIN W. MUGFORD, III and	:	
EUGENE MARANO	:	

SUPERSEDING INDICTMENT

COUNT ONE

The Conspiracy Count

A. Introduction

The Grand Jury Charges:

At all times material to this

Indictment:

1. ROYAL BUICK CO., INC., (hereinafter ROYAL BUICK) was an automobile dealership engaging in the business of retail sales of new and used automobiles in Tampa, Florida.

2. BRIAN SMITH was general sales manager of ROYAL BUICK.

3. RICK TAYLOR, JOSEPH SCARBOROUGH, VICTOR NOEL CHRISTMAS, and JERRY WALKER were sales managers at ROYAL BUICK.

4. JOSEPH GLASGOW was a sales manager and used car manager at ROYAL BUICK.

5. RALPH RODRIGUEZ was a sales manager and finance manager at ROYAL BUICK.

6. MICHAEL MCMILLEN, LEE TYLER, JOHN DELOACH, JR., THOMAS MCCARTHY, DAVID ROEMER, MARK MEARS, KEVIN SCOTT, EDWIN W. MUGFORD, III and EUGENE MARANO were

salesmen at ROYAL BUICK.

7. Florida National Bank (FNB) was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation.

8. KATHLEEN GERMAN was a loan officer at FNB.

9. A large number of ROYAL BUICK's customers obtained automobile financing from FNB during 1985 and 1986.

B. The Conspiracy

10. That from on or about January, 1985 and continuing thereafter until on or about August, 1986, in the Middle District of Florida, the defendants, ROYAL BUICK, INC., BRIAN SMITH, RICK TAYLOR, KATHLEEN GERMAN, JOSEPH GLASGOW, VICTOR NOEL CHRISTMAS, JERRY WALKER, RALPH RODRIGUEZ, JOSEPH SC[illegible]BOROUGH, LEE TYLER, JOHN DELOACH, JR., THOMAS MCCARTHY, MICHAEL MCMILLEN, DAVID ROEMER, MARK

MEARS, KEVIN SCOTT, EDWIN W. MUGFORD, III and EUGENE MARANO,

did willfully and knowingly, combine, conspire, confederate and agree with each other and with others to the grand jury known and unknown, to commit offenses against the United States, that is:

a. To execute a scheme or artifice to defraud a federally insured financial institution, in violation of Title 18, United States Code, Section 1344;

b. To use the mails in execution of a scheme to defraud, in violation of Title 18, United States Code, Section 1341;

c. To make false statements on loan applications submitted to a federally insured bank, in violation of Title 18, Unites States Code, Section 1014.

d. To give or offer

something of value to an officer of a federally insured bank with the intent to influence and reward said officer in connection with the business of the bank, in violation of Title 18, United States Code, Section 215.

e. To misapply the funds of a federally insured bank, in violation of Title 18, United States Code, Section 656.

C. The Methods and Means of the Conspiracy

11. It was a part of said conspiracy that ROYAL BUICK would and did reward its sales managers and salesmen for making large numbers of sales and established quotas for sales on a monthly basis.

12. It was a part of said conspiracy that the defendants employed at ROYAL BUICK would and did cause advertisements

to be placed in local newspapers in order to entice low income customers with poor credit or not credit to call a certain telephone number for the purpose of buying an automobile. One of the advertisements urged potential customers to ask for "Betty Moses." The phone number was that of ROYAL BUICK and "Betty Moses" was a fictitious ROYAL BUICK sales person.

13. It was a further part of said conspiracy that receptionists at ROYAL BUICK would and did direct customers calling for "Betty Moses" to a salesman or sales manager.

14. It was a further part of said conspiracy that the defendant managers at ROYAL BUICK would and did counsel and advise salesmen regarding the preparation of false and misleading loan applications.

15. It was a further part of said conspiracy that the defendants employed at

ROYAL BUICK would and did make and cause to be made false statements and representations on loan applications of customers so that those customers with poor credit would appear to be qualified for automobile loans.

16. It was a further part of said conspiracy that the defendants employed at ROYAL BUICK would and did conceal information relating to items "added on" to the price of automobiles from customers as well as information regarding supposed "rebates" to the purchasers.

17. It was a further part of said conspiracy that the defendants employed at ROYAL BUICK would and did conceal from FNB the fact that many customers applying for automobile loans had not made down payments.

18. It was a further part of said conspiracy that the defendants would and

did conclude the sale of a substantial number of automobiles in order that the loan proceeds from FNB would be obtained by ROYAL BUICK and the defendants employed at ROYAL BUICK would receive commissions, bonuses and promotions.

19. It was a further part of said conspiracy that the defendants employed at ROYAL BUICK would and did entertain and give things of value to KATHLEEN GERMAN for the purpose of influencing her in connection with her duties at FNB.

20. It was a further part of said conspiracy that KATHLEEN GERMAN, at the request of other defendants, would and did approve a large number of loan applications from ROYAL BUICK without making adequate credit checks, knowing that the customers were bad credit risks, that false statements and representations had been made on the applications, and

that some applications had been rejected on earlier occasions by other loan officers.

21. It was a further part of said conspiracy that KATHLEEN GERMAN would and did conceal from other bank officers at FNB the fact that she had approved a substantial number of loan applications that should not have been approved.

22. It was a further part of said conspiracy that the defendants employed at ROYAL BUICK would and did cause at least 200 loan applications containing false statements and representations to be submitted to FNB knowing that many of the loans made by said bank would go into default and the automobiles would be repossessed from the customers.

23. It was a further part of said conspiracy that ROYAL BUICK would and did purchase many of the repossessed

automobiles from FNB which were then sold again to new customers with poor credit who obtained loans from FNB which were approved by KATHLEEN GERMAN.

D. Overt Acts

24. In order to accomplish the objects of the conspiracy, the following overt acts, among others, were committed in the Middle District of Florida:

[Extraneous material deleted]

(21) In February, 1986, EDWIN W. MUGFORD, III had a conversation with a ROYAL BUICK customer.

[Extraneous material deleted]

In violation of Title 18, United States Code, Section 371.

COUNTS TWO THROUGH FOURTEEN

The Bank Fraud Counts

1. The allegations of Section A of Count One are repeated and realleged as if

fully set forth herein.

2. That from on or about January, 1985 to on or about August, 1986, in the Middle District of Florida, the defendants,

ROYAL BUICK, INC., BRIAN SMITH, RICK TAYLOR, KATHLEEN GERMAN, JOSEPH GLASGOW, VICTOR NOEL CHRISTMAS, JERRY WALKER, RALPH RODRIGUEZ, JOSEPH SCARBOROUGH, LEE TYLER, JOHN DELOACH, JR., THOMAS MCCARTHY, MICHAEL MCMILLEN, DAVID ROEMER, MARK MEARS, KEVIN SCOTT, EDWIN W. MUGFORD and EUGENE MARANO,

did knowingly and willfully execute and attempt to execute a scheme and artifice to defraud Florida National Bank, a federally insured financial institution, and for obtaining money and funds owned by and under the custody and control of Florida National Bank by means of false and fraudulent pretenses, representations, and promises.

3. The method and means of the scheme and artifice to defraud are set

forth in Section C of Count One, the allegations of which are repeated and realleged as if fully set forth herein.

4. On or about the dates listed below, for the purpose of executing the aforementioned scheme and artifice to defraud, the defendants knowingly caused false loan applications for the customers listed below to be submitted to FNB:

[Extraneous material deleted]

COUNT	DATE	CUSTOMER	APPROXIMATE LOAN AMOUNT
[Extraneous material deleted]			
10	05/24/86	Shelby Pryor	10,673

[Extraneous material deleted]

COUNTS FIFTEEN THROUGH THIRTY-TWO

The Mail Fraud Counts

1. The allegations of Section A of Count One are repeated and realleged as if fully set forth herein.

2. That from on or about January,

1985 to on or about August 1986, in the Middle District of Florida, the defendants,

ROYAL BUICK, INC., BRIAN SMITH, RICK TAYLOR, KATHLEEN GERMAN, JOSEPH GLASGOW, VICTOR NOEL CHRISTMAS, JERRY WALKER, RALPH RODRIGUEZ, JOSEPH SCARBOROUGH, LEE TYLER, JOHN DELOACH, JR., RICHARD GIANCOLA, THOMAS MCCARTHY, MICHAEL MCMILLEN, DAVID ROEMER, MARK MEARS, KEVIN SCOTT, EDWIN W. MUGFORD, III AND EUGENE MARANO,

did knowingly and willfully devise and intend to devise a scheme and artifice to defraud Florida National Bank and customers of ROYAL BUICK and for obtaining money and property by means of false and fraudulent pretenses, representations and promises and the concealment of material facts.

3. The method and means of the scheme and artifice to defraud are set forth in Section C of Count one, the allegations of which are repeated and realleged as if fully set forth herein.

4. On or about the dates listed below, for the purpose of executing the aforementioned scheme and artifice to defraud and attempting to do so, the defendants did knowingly cause to be delivered by the United States Postal Service, according to the directions thereon, the matter described below:

[Extraneous material deleted]

COUNT 18 August, 1986 Automobile Title in the name of Samuel Caperton, Tallahassee, Florida to Orlando, Florida

[Extraneous material deleted]

In violation of Title 18, United States Code, Section 1014.

[Extraneous material deleted]

COUNT FORTY-NINE

That on or about April 4, 1986, in the Middle District of Florida, the defendants,

ROYAL BUICK
and
EDWIN W. MUGFORD, III

did knowingly make and cause to be made a false material statement in an application for an automobile loan in the amount of approximately $10,600.00 from Florida National Bank of Tampa, Florida, a bank the deposits of which were insured by the Federal Deposit Insurance Corporation, for a ROYAL BUICK customer named Tracey Kenty, for the purpose of influencing said bank, in that the defendants caused said loan application to reflect that:

1. Tracey Kenty had a checking account at Sun Bank. Whereas, as the defendants then and there well knew:

1. Tracey Kenty did not have a checking account at Sun Bank.

In violation of Title 18, United States Code, Section 1014.

COUNT FIFTY

That on or about June 16, 1986, in the Middle District of Florida, the

defendants,

ROYAL BUICK
and
EDWIN W. MUGFORD, III,

did knowingly make and cause to be made a false material statement in an application for an automobile loan in the amount of approximately $8,836 from Florida National Bank of Tampa, Florida, a bank the deposits of which were insured by the Federal Deposit Insurance Corporation, for ROYAL BUICK customer named Jeffrey Mosley, for the purpose of influencing said bank, in that the defendants caused said loan application to reflect that:

1. Jeffrey Mosley had a checking account at Sun Bank. Whereas, as the defendants then and there well knew:

1. Jeffrey Mosley did not have a checking account at Sun Bank.

In violation of Title 18, United States Code, Section 1014.

[Extraneous material deleted]

A TRUE BILL,

_____
FOREMAN

ROBERT W. GENZMAN
United States Attorney

By: _____
JAMES L. POWERS
Assistant United States Attorney
Chief, Major Fraud Section

By: _____
JULIA M. HYMAN
Assistant United States Attorney

Federal Rules of Civil Procedure

Rule 801. Definitions

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if-

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and infurtherance of the conspiracy.

(As amended Pub.L. 94-113, § 1, Oct. 16, 1975, 89 Stat. 576; Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all

as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Title 18 U.S.C.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than five years, or both.

If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1014. Loan and credit applications generally; renewals and discounts; crop insurance.

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under section 1131-

1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, A federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell dispose of, loan, exchange,

alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1344. Bank Fraud

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice-

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "federally chartered or insured financial institution" means-

(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union Administration Board;

(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or

(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States.

Supreme Court, U.S.
FILED
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No. 93-349

In the Supreme Court of the United States

OCTOBER TERM, 1993

EDWIN W. MUGFORD, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly admitted into evidence nine customer loan applications and related automobile sales documents.

2. Whether the admission of the customer loan applications violated petitioner's rights under the Confrontation Clause.

3. Whether the evidence was sufficient to support petitioner's convictions for conspiracy and fraud.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. vii) is unreported, but the judgment is noted at 995 F.2d 236 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1993. Pet. App. vii. A petition for rehearing was denied on August 6, 1993. Pet. App. viii-ix. The petition for a writ of certiorari was filed on September 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to defraud a federally insured financial institution, in violation of 18 U.S.C. 371; one count of bank fraud, in violation of 18 U.S.C. 1344; one count of mail fraud, in violation of 18 U.S.C. 1341; and one count of making false statements in a loan application, in violation of 18 U.S.C. 1014. The court suspended petitioner's sentence and placed him on probation for three years. The court of appeals affirmed. Pet. App. vii.

1. Petitioner was a salesman at Royal Buick, Inc., a car dealership in Tampa, Florida, from January 1985 through the summer of 1986. In early 1985, two managers at Royal Buick created an advertising program targeted at persons with bad credit or no credit history. Royal Buick's advertisements suggested that potential customers call "Betty Moses" or "Frank Moses," fictional names chosen by the two managers because they would not intimidate the targeted customers. Gov't C.A. Br. 6.

As a result of those advertisements, many lower- and middle-income customers with bad credit went to Royal Buick to purchase used cars. The Royal Buick salesmen treated the "Betty Moses" customers differently from other customers: the salesmen usually took a Betty Moses customer's credit information over the telephone and then filled out the customer's credit applications themselves, falsifying the credit history, banking, employment, housing, and other information in order to make the customer appear more stable, and to give the customer a credit

history that could not be verified. A Betty Moses customer who came into the dealership was asked to sign a blank credit application that one of the salesmen would complete, again with false information, after the customer left. Once the application was completed, Royal Buick would submit it to Florida National Bank for approval. If the bank approved the loan application, the salesman would call the customer to tell him he had been approved for a certain car and on specific terms. Gov't C.A. Br. 7-8.

The Betty Moses customers received different treatment in other ways as well. Because the Betty Moses customers could not object to the terms of the sale, the salesmen sold them cars at prices above the cars' value, added extended warranties and life and disability insurance contracts without the customers' knowledge, and charged interest rates as high as the State of Florida allowed and far above the bank's rates. Many of the cars, however, had mechanical problems. Gov't C.A. Br. 14-17.

Royal Buick salesmen were taught how to falsify credit applications during their regular morning sales meetings, in individual meetings with Royal Buick managers, and by watching the managers rewrite applications. The salesmen were told to give customers telephone numbers, checking accounts, credit accounts, and part-time jobs to ensure that Florida National Bank would approve the loan applications.[1] The falsification of the credit applications was a general practice among Royal Buick employees.

[1] Kathleen German, a loan officer at Florida National Bank and co-defendant in this case, handled the Royal Buick loans and was aware of the falsification of loan applications. Gov't C.A. Br. 20-22.

Like the other salesmen, petitioner added extra jobs or extra income to credit applications, and he advised another salesman that, when completing an application for a customer who had no credit, the salesman should "give them some credit or give them a Visa or whatever." Gov't C.A. Br. 28; *id.* at 8-13.

In addition to defrauding Florida National Bank through the submission of false credit applications, Royal Buick salesmen used an internal rebate scheme to make the bank believe that the customers had made down payments on their cars. Royal Buick raised the price of the car reported to the bank, issued a "rebate" check to the customer that the customer then signed back to Royal Buick, and reported the receipt of those funds as a down payment. Another scheme employed by Royal Buick involved the sale of a new car to a customer who wanted to trade in an old car worth less than the amount owed on it. Since the bank would only lend a certain amount over the price of a new car, Royal Buick bought and resold the new car so that it became a used car and the bank would make the higher used-car loan. Gov't C.A. Br. 17-19.

Royal Buick's "Betty Moses" promotion doubled its sales of used cars. As a result, for the one and one-half years of the scheme, all of Royal Buick's employees profited. Salesmen were paid by the number of cars they sold and a percentage of the profit, and promotions were given to the salesmen who sold the most cars. In the end, however, most of the Betty Moses cars were repossessed when the customers could not make the sizable payments. Royal Buick abandoned the Betty Moses promotion in the summer of 1986, when Kathleen German, the Florida National Bank loan officer who had handled Royal Buick's

loans, was removed from her position. Gov't C.A. Br. 19-22.

2. Petitioner, Royal Buick, and 16 other individuals were indicted on charges of conspiring to defraud Florida National Bank and of committing substantive fraud offenses. At trial, the government offered into evidence Royal Buick's sales files, each of which contained the customer's loan application, a salesman's worksheet on that customer, an application and agreement for insurance, a cashout sheet, a check list, an extended warranty agreement, an odometer mileage statement (part of the state application for transfer of title), an automobile repossession notice, and other documents. Gov't C.A. Br. 29-30, 33-34.

Former Royal Buick salesman David Wilkerson, who worked at Royal Buick from 1983 to 1988, testified that he was familiar with the files, that the documents were kept in the regular course of the company's business, that Royal Buick relied on the documents, and that they had been prepared by persons with the information necessary to complete the documents. 17 Tr. 165-171. Defense counsel objected to the introduction of the records on two grounds: first, that Wilkerson was not qualified to introduce the Royal Buick records because he did not have the requisite knowledge or position in Royal Buick, and second, that documents relating to sales not specifically enumerated in the indictment should not be admitted under Fed. R. Evid. 404(b). 17 Tr. 169-171. The court overruled the objections, finding the documents admissible under Fed. R. Evid. 803(6), 901(b)(4), and 1003, and, in light of the conspiracy charge, the court also found the documents properly admissible under Fed. R. Evid. 404(b). 17 Tr. 171.

The jury convicted petitioner on the conspiracy count and three substantive fraud counts. Pet. App. x-xi. The court of appeals affirmed without opinion. *Id.* at vii.

ARGUMENT

1. Petitioner contends (Pet. 6-42) that the district court erred in admitting into evidence nine loan applications on which he was identified as the salesman.[2] He claims that the records did not have the requisite guarantee of trustworthiness (Pet. 6-7, 12-33), and that their admission as business records was contrary to decisions of six other courts of appeals (Pet. 29-30 & n.3). Because petitioner failed to object to the admission of the documents under the business-records exception, his claim with respect to that point is reviewable only for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Young*, 470 U.S. 1, 15-16 (1985). The plain error doctrine encompasses only "particularly egregious" errors that result in a "miscarriage of justice," *United States* v. *Olano*, 113 S. Ct. 1770, 1779 (1993); *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982), and petitioner fails to make such a showing. In any event, petitioner can demonstrate no error in the admission of the documents.

a. As the government argued in the court of appeals, the customers' loan applications and related

[2] The government introduced 11 credit applications that listed petitioner as the salesman. The evidence established that the application for Hedrick Burns had been completed by another salesman, however, and the jury acquitted petitioner on the substantive count associated with the loan application of customer Jeffrey Mosley. Gov't C.A. Br. 29. Thus, there are only nine loan applications at issue here.

documents were properly admitted without regard to the business records exception, because they were not offered as hearsay, *i.e.*, out of court statements used to establish the truth of the matter asserted. In fact, as the testimony established, the loan applications were replete with false information regarding the customers' residences, income, employment, and credit, and it was that falsity that was relevant to the violations in this case. Gov't C.A. Br. 103-107.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Statements admitted to prove the falsity of the matter asserted are not regulated by the hearsay rule. *Anderson* v. *United States*, 417 U.S. 211, 219-220 (1974); *United States* v. *Adkins*, 741 F.2d 744, 746 (5th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); see *United States* v. *Sliker*, 751 F.2d 477, 489 (2d Cir. 1984), certs. denied, 470 U.S. 1058 and 471 U.S. 1137 (1985); *United States* v. *Gibson*, 690 F.2d 697, 700 (9th Cir. 1982), cert. denied, 460 U.S. 1046 (1983); see also *United States* v. *Hershenow*, 680 F.2d 847, 861 n.12 (1st Cir. 1982). Such statements, or the documents in which they appear, are admitted to prove that the statements were made, and to establish a foundation for later showing, through other admissible evidence, that the statements were false. *Adkins*, 741 F.2d at 746; *United States* v. *Clark*, 737 F.2d 679, 681 (7th Cir. 1984); *Sliker*, 751 F.2d at 489; *Gibson*, 690 F.2d at 700 n.1; *Hershenow*, 680 F.2d at 861 n.12; *United States* v. *Lieberman*, 637 F.2d 95, 101 (2d Cir. 1980). The loan applications in this case were admissible to prove that Royal Buick and its customers completed loan applications and to establish

the existence and nature of the scheme to defraud Florida National Bank; other evidence made possible the inference that the information in the loan applications was false and that the Royal Buick employees had supplied that false information.[3] See *Adkins*, 741 F.2d at 746; *Lieberman*, 637 F.2d at 101.

The district court admitted all of the Royal Buick sales files, including the loan applications, pursuant to the business records exception to the hearsay rule, Fed. R. Evid. 803(6). Nevertheless, a trial court's decision to admit evidence will not be reversed where there exists any proper basis for the admission of the evidence. See, *e.g.*, *Onujiogu* v. *United States*, 817 F.2d 3, 5 (1st Cir. 1987); *United States* v. *Moore*, 748 F.2d 246, 248 (5th Cir. 1984); *United States* v. *Evans*, 572 F.2d 455, 488 (5th Cir.), cert. denied, 439 U.S. 870 (1978). Because the loan applications were admissible for the non-hearsay purpose of showing that they were false, their admission into evidence is not a basis for reversal.

b. Contrary to petitioner's contention (Pet. 25-32), this case does not create a circuit conflict with

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[3] Petitioner contends (Pet. 19-25) that the loan applications were hearsay because they were offered to prove that petitioner was the salesman on those sales, as stated on the applications, and that he falsified the documents. The loan applications were offered to establish that they were completed; other evidence, such as the related documents in the sales files, proved that petitioner was the salesman on those sales. The testimony of other Royal Buick salesmen demonstrated that it was the regular practice of Royal Buick employees to falsify the loan applications and that petitioner knew about and participated in such falsification. From that evidence, the jury reasonably could infer that petitioner had falsified the loan applications at issue.

respect to the admissibility of business records containing double hearsay or otherwise failing to satisfy the requirements of the Rule 803(6) exception. Petitioner is correct that other courts of appeals have held that documents are not admissible under the business records exception if any participant in the production of the record is not acting within the regular course of his business's activity, and that the business records exception does not apply to an entire record when some of the information in it is based on statements of persons not acting in the regular course of that business. See, *e.g.*, *Wilson* v. *Zapata Off-Shore Co.*, 939 F.2d 260, 271-272 (5th Cir. 1991); *United States* v. *Snyder*, 787 F.2d 1429, 1434 (10th Cir.), cert. denied, 479 U.S. 836 (1986); *United States* v. *Pazsint*, 703 F.2d 420, 424-425 (9th Cir. 1983); *United States* v. *Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982); *Lieberman*, 637 F.2d at 100-101; see also *Datamatic Services, Inc.* v. *United States*, 909 F.2d 1029, 1033 (7th Cir. 1990). But the court's decision to admit the loan applications in this case does not conflict with that principle, because the loan applications were properly admissible as non-hearsay. It was therefore not necessary for them to satisfy the requirements of Fed. R. Evid. 803(6).

c. The remaining documents in the Royal Buick sales files were properly admissible under the business records exception to the hearsay rule, and petitioner does not contend that they included double hearsay or otherwise failed to meet the requirements of Rule 803(6). The other documents included salesmen's worksheets, warranty agreements, insurance records, applications for titles, and other documents of "everyday activity." The testimony of David Wilk-

erson and other Royal Buick salesmen established that the documents were made at the time of the sales and that the documents were maintained in the regular course of business by Royal Buick employees who had a duty to record the transactions accurately. The district court reasonably determined that those records satisfied the requirements of Rule 803(6), including trustworthiness, and petitioner and his co-defendants offered no evidence to the contrary. See *United States* v. *Patterson*, 644 F.2d 890, 900-901 (1st Cir. 1981) (determination of trustworthiness is within trial court's discretion); see also *United States* v. *Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986) (evidentiary rulings are within trial court's discretion).

To the extent that petitioner is renewing his claim (Pet. 32-37) that Wilkerson was not qualified to introduce the Royal Buick files and that the documents were not properly authenticated, his claims must fail. Wilkerson testified that he worked as a salesman at Royal Buick from 1983 to 1988, that the records were kept in the regular course of business, that he was familiar with the files generally and with those relating to his own sales specifically, and that he could identify the records as Royal Buick's business records from the appearance of the files. 17 Tr. 165-171. A witness "need not have been the preparer of the record, nor must he personally attest to the accuracy of the information contained in the records" in order to be qualified to introduce business records into evidence. *Wilson* v. *Zapata Off-Shore Co.*, 939 F.2d at 272 (emphasis and internal quotation marks deleted); see *Hathaway*, 798 F.2d at 906 (a witness is qualified to introduce records if he has knowledge of the regular practices of the business); *United States*

v. *Moore*, 791 F.2d 566, 574-575 (7th Cir. 1986) ("qualified witness" broadly interpreted as someone who understands the system).[4]

Moreover, Wilkerson's testimony sufficiently authenticated the business records. Authentication may be established by, *inter alia*, "distinctive characteristics" such as "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Fed. R. Evid. 901(b)(4). Wilkerson testified that he recognized the files because they included records from his own sales, and, generally, from the files' "appearance" —*i.e.*, from items in the files such as the names of customers and "everyday activity, like buyer's orders, credit statements, and things like that." 17 Tr. 170-171. That was sufficient authentication. See *Sliker*, 751 F.2d at 488.

2. Petitioner also contends (Pet. 42-55) that the admission of the loan applications violated his right to confront the witnesses against him under the Confrontation Clause of the Sixth Amendment. The loan applications, however, do not raise Confrontation Clause issues because they were not used for the hearsay purpose of proving the truth of their

[4] Petitioner's reliance (Pet. 34) on *United States* v. *Porter*, 821 F.2d 968, 977 (4th Cir. 1987), cert. denied, 485 U.S. 934 (1988), is misplaced. In *Porter*, the court held that the company's security officer was not qualified to introduce the company's personnel records because he did not work in the personnel department, did not know the company's record-keeping requirements, and could testify only that hiring cards were used. *Ibid.* Here, in contrast, Wilkerson was familiar with the records and record-keeping requirements because he was required to prepare some of the records and he worked with the files in the regular course of his employment.

contents. The admission of out-of-court statements for a purpose other than to prove the truth of the matter asserted "raises no Confrontation Clause concerns." *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985) (holding that when an out-of-court confession is admitted for purposes other than to prove the truth of the confession, there is no right to confront the person who confessed); *Hathaway*, 798 F.2d at 905 (when "statements are offered to prove the falsity of the matter asserted, there is no need to assess the credibility of the declarant"). Petitioner had an opportunity to confront the persons who sponsored the admission of the loan applications, and that is all the Confrontation Clause required. *Tennessee* v. *Street*, *supra*.[5]

Nor were petitioner's confrontation rights violated with respect to those documents properly admitted as business records under Rule 803(6). This Court has held that "firmly rooted" exceptions to the hearsay rule carry sufficient indicia of reliability to satisfy reliability concerns under the Confrontation Clause. *White* v. *Illinois*, 112 S. Ct. 736, 742-743 & n.8 (1992); *Bourjaily* v. *United States*, 483 U.S. 171, 182-184 (1987); *Ohio* v. *Roberts*, 448 U.S. 56, 65-66 (1980). The business records exception, like the exceptions for statements made for purposes of medical diagnosis or

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[5] Petitioner also contends (Pet. 44-45) that the admission of the loan applications lowered the government's burden of proof because the admission told the jury that the customer was not the source of the false information and that each customer would deny that he provided the false information. Both of these conclusions were valid inferences about the documents based upon other evidence offered by the case; neither inference resulted from the mere admission of the loan applications.

treatment, and for spontaneous declarations, see *White* v. *Illinois*, 112 S. Ct. at 742 n.8, is such a firmly rooted exception. See *United States* v. *Baker*, 855 F.2d 1353, 1360 (8th Cir. 1988), cert. denied, 490 U.S. 1069 (1989); *United States* v. *Miller*, 830 F.2d 1073, 1077 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988); see also *Ohio* v. *Roberts*, 448 U.S. at 66 n.8. Once a statement qualifies for admission under Rule 803(6), its reliability has been sufficiently established for Confrontation Clause purposes, and "adversarial testing can be expected to add little to its reliability." *White* v. *Illinois*, 112 S. Ct. at 743.

3. Petitioner renews his claim (Pet. 55-63) that the evidence was insufficient to sustain his convictions for conspiracy and fraud. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). That standard was met here.

a. There was ample evidence to establish a conspiracy in which petitioner participated. Several former Royal Buick salesmen testified that petitioner was aware of the fraudulent loan applications and "Betty Moses" car purchases, and that he participated in the illegal activity. Fellow salesman Wilkerson testified that he saw petitioner add an extra job or extra income to a credit statement. Former salesman Joseph Scarbrough testified that after he told petitioner that a customer had no credit and thus would be unable to qualify for a loan, petitioner suggested that Scarbrough "give [the customer] some credit or give them a Visa or whatever." Gov't C.A. Br. 28.

Wilkerson also testified that another Royal Buick employee commented that petitioner's profit on one "45-day rental"—*i.e.*, a car sale in which the customer would likely make only one or two payments before repossession—"was probably the highest dollar amount of profit that Royal Buick had ever made off of one customer in regard to financing." *Ibid.*; *id.* at 28-29, 59-60.

In addition, the government also entered into evidence nine car loan applications, all of which contained false credit information on the customer, were completed in the same handwriting, and identified petitioner as the salesman.[6] Those applications were included in the customers' files, which also contained invoices for the cars with petitioner's name, other documents identifying petitioner as the salesman, and at least one document bearing petitioner's signature, such as the odometer mileage statement (attached to the state application for transfer of title), or an insurance agreement. Each file also included a document showing that the automobile had been repossessed. Gov't C.A. Br. 29-30, 60-62. Based on that

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[6] Petitioner was not listed on one of the applications as the salesman; the handwriting on that application is identical to the handwriting on the other nine, however, and other documents in that customer's file include petitioner's name and signature. Gov't C.A. Br. 29. Petitioner's claim (Pet. 58-60) that the evidence is insufficient because no one identified his handwriting and thus it is only his name on the application that ties him into the conspiracy is without merit. There was sufficient evidence presented by other witnesses and by the other documents admitted into evidence from which a jury could reasonably infer that petitioner was in fact the salesman in those nine sales, and that he falsified the information on the loan applications.

evidence, it was reasonable for the jury to find that petitioner was part of a conspiracy to defraud Florida National Bank.

b. There was also sufficient evidence to support petitioner's convictions on the substantive fraud counts. Petitioner was convicted of bank fraud, in violation of 18 U.S.C. 1344, in connection with the loan application of customer Shelby Pryor in Count 10. That application and other sales documents in Royal Buick's file identify petitioner as the salesman; two documents include petitioner's signature. The loan application contains false statements about Pryor's occupation, salary, and bank account, and it shows a $1,000 cash down payment that was, in fact, a rebate to Royal-Buick. Gov't C.A. Br. 30-31, 62. That evidence—the information about the false cash down payment, in particular[7]—supports petitioner's conviction for falsifying Pryor's loan application and causing it to be submitted to Florida National Bank as part of the scheme to defraud the bank.

There was also sufficient evidence to sustain petitioner's conviction on Count 19 for mail fraud, in violation of 18 U.S.C. 1341, in connection with the loan application of customer Samuel Caperton and the mailing of Caperton's automobile title. Caperton's loan application falsely states that he had an account at Barnett Bank in 1986, and that he made a $1,000 cash down payment for his car. The $1,000 was, in reality, a rebate to Royal Buick. Caperton's loan

[7] The information about the false cash down payment could only have been added by a Royal Buick employee, contrary to petitioner's claim (Pet. 6-7, 21-24, 34-37) that there was insufficient evidence to convict him because the customers could have provided the false information on the loan applications.

application and the sales worksheet and other documents in his Royal Buick file identify petitioner as the salesman, and three documents in that file contain petitioner's signature. That, in conjunction with evidence showing that automobile titles were mailed between the Department of Motor Vehicles and Florida National Bank in the regular course of business, was sufficient. Gov't C.A. Br. 31, 40-41, 62-63.

Finally, petitioner was convicted of making a false statement in the loan application of customer Tracey Kenty (Count 49) and causing the application to be submitted to Florida National Bank in order to induce the bank to authorize a loan for Kenty, in violation of 18 U.S.C. 1014. Kenty's loan application falsely states that Kenty had an account at Sun Bank; another credit application Kenty made a few months earlier does not list the Sun Bank account. In addition, the loan application and six other Royal Buick documents identify petitioner as the salesman, and two documents contain petitioner's signature. That evidence was sufficient to sustain petitioner's conviction for making a false statement in Kenty's loan application. Gov't C.A. Br. 31, 63-64.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1993

No. 93-349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Supreme Court, U.S.
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EDWIN W. MUGFORD, III,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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EDWIN W. MUGFORD, III v. UNITED STATES

CERTIFICATE OF INTERESTED PERSONS AND CORPORATION DISCLOSURE STATEMENT

First Union National Bank, Successor in interest to Florida National Bank, a victim

Hon. Wm. Terrell Hodges, United States District Judge

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MISCELLANEOUS

Supreme Court Rule 15 2

I. *MISSTATEMENTS IN OPPOSITION BRIEF*

There are misstatements of fact in the opposition brief. Contrary to the government's assertions at page 2 that Mugford's employment began at or about the time of the commencement of the conspiracy in January 1985, the evidence did not establish his employment at Royal Buick until the spring of 1986 (R42-pp. 5-22).

The opposition also takes out of context testimony referred to as "other evidence" supporting the convictions. No evidence was presented from which it could be reasonably inferred Mugford discussed illegal acts with others to further the conspiracy, falsified loan applications, or engaged in any illegal acts (Opp.Br., pp. 2, 4, 8 n.3, 13, 14 & n.6).[1]

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[1] Wilkerson, Scarborough and McMillen gave testimony which the government contends establishes "other evidence" of Mugford's guilt. Although it is a well-settled legal principle that

on appeal, all reasonable inferences of fact are to be construed in the light most favorable to the government, the natural corollary which evolves from that principle is that unreasonable inferences and distortions of the record are not permitted. *See*, Supreme Court Rule 15. Notwithstanding the government's "spin," the record does not support the contentions in the opposition brief.

Wilkerson testified that Mugford would have "had occasion to attend" sales meetings at which the falsification of credit applications was discussed, but did not place him at any of them (R18-p.70). He further testified the meetings he referenced might have occurred in 1985 (R19-p.42), which pre-dated Mugford's employment in the Spring, 1986 (R42-pp.5-22).

Though Wilkerson could not recall the customer or find the credit application among the files admitted into evidence, he also claimed he saw Mugford add a second job or income to a credit application that he (Wilkerson) found "creative" (R18-p.72). That testimony is incredible because the government could not produce a single credit application attributable to Mugford with a second job or income.

Scarborough (a manager, not a salesman) did not testify that he discussed a credit application with Mugford in which Mugford said "to put a VISA on it or give him some credit." Op.Br., p. 13. A review of Scarborough's testimony reveals (R21-pp.37,38) he was discussing an application with another salesman on the showroom floor. In the context of the "joking" among salesman about which Scarborough was then testifying, Mugford's comment was at most a casual remark of no probative value. *See*, ***United States v. Urbanik***, 801 F.2d 692, 698 (4th Cir.1986) [holding "not harmless error" to admit under Rule 801(d)(2)(E) "casual aside" that touches upon but does not "further" conspiracy].

The testimony of McMillen (R16-pp.29,30) also was not correctly put forth in the opposition brief. Rather than show Mugford's participation in the conspiracy, McMillen's testimony tends to disprove it. Moreover, while acknowledging he discussed falsification of credit applications with other employees of Royal Buick, he

That this "other evidence" was not a factor in the convictions is evident in the exchange between the district court and the prosecutor at the close of the government's case-in-chief when the court was considering Mugford's Rule 29 motion for judgment of acquittal. After hearing the court's summation of the evidence against Mugford (consisting only of the false statements appearing in the credit applications), and its inquiry, "How could the jury conclude ... beyond a reasonable doubt ... that the [false] entries ... were the figments of [Mugford's]

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specifically denied any such discussion with Mugford.

The government's references to the "rebates" and other charges as being indicative of Mugford's guilt is misstated. The government's evidence at trial established the salesmen had no role in the rebates and the "add-ons." Rebates and other "add-ons" to the final amount financed were by the managers (R19-pp.7,8; R18-p.76; R21-pp.74,77; R23-p.66), were located on the lowest part of the credit application reserved specifically to the F & I department, and written in a different hand than the rest of each application.

imagination as distinguished from that of the customer?", the prosecutor replied:

> "... **we suggest the jury can certainly infer that when false information is placed on the loan applications * * * *that the salesmen* [*sic*] *did it* pursuant to the scheme to defraud and the conspiracy." (R38-pp. 58-60)[emphasis added].

Neither during the course of this argument to the court, nor in its closing argument to the jury (R45-pp.12, 15-17), did the government make reference to this "other evidence." It relied solely on the false entries in the credit applications to support the charges in the indictment against Mugford.

I. *THE CREDIT APPLICATIONS WERE NOT ADMISSIBLE AS NON-HEARSAY*

The government admits there exists a split among the circuits as to the admission of the credit applications under Rule 803(6). It does not refute, and

apparently concedes, the trial court erred in admitting the nine credit applications pursuant to the business records exception to the hearsay rule because the source of the information (the customer) was not acting in the regular course of business.[2] It also abandoned its argument in the Court of Appeals--that the credit applications were otherwise admissible as hearsay exceptions under Rules 801(d)(2)(D) and 801(d)(2)(E).[3] The government contends the applications were admissible as non-hearsay because they were not offered in evidence for the truth

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[2] Brief in Opposition, pp. 8-9: "Petitioner is correct that other courts of appeal have held that documents are not admissible under the business records exception if any participant in the production of the record is not acting within the regular course of the his business's activity, and that the business records exception does not apply to an entire business record when some of the information in it is based on statements of persons not acting in the regular course of that business." [Citations omitted]

[3] Brief of Appellee, p.107. (C.A. 11th Cir.).

of the matter asserted. Nothing could be further from the truth because that was precisely the reason the evidence was offered, and how it was used to convict! *Supra.*, p. 4.

A review of the record proves the government sought introduction of the files and the credit applications pursuant to the business records exception by laying a foundation to qualify Wilkerson as a non-custodial witness under Rule 803(6), F.R.Ev. (R17, pp. 163-172).[4] Moreover, both in arguing against a judgment of acquittal and in its final speech to the jury, the government

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[4] Contrary to the government's assertion, there was objection to the admission of the documents on that basis. By pre-trial order and agreement of counsel, Mr. Winkles, counsel for Royal Buick, was designated to be lead counsel for all defendants. The court specifically stated that objections made by Mr. Winkles would be deemed adopted by all other defendants unless a particular defendant specifically made known to the court his intent to not ally himself with the objection. Mr. Winkles' objection appears in the record (R17-pp.169,170).

referred only to the credit applications in support of the charges subject to this appeal, *ibid.*, because there was no evidence other than his name as salesman on the credit applications to connect Mugford to the fraud alleged in the indictment!

Mugford does not dispute the credit applications contained false statements. But that fact alone does not make them admissible as non-hearsay. The government misplaces its reliance on that argument (and upon the cases in recites in support) for the simple reason that there was no evidence demonstrating ***who, other than the customer,*** made the false statements contained in the eleven credit applications. In each and every case cited in opposition where evidence was admitted as non-hearsay (to prove the falsity of a statement or assertion) there was no

question of the identity of the declarant.

Contra, the facts of this case where the identity of the declarant of the false information was never proved to be the defendant against whom they were used to convict. *Authorship of the false entries in each of the credit applications is the critical question the government left unanswered at trial.* The question remained unanswered in the court of appeals, and in the brief in opposition to this petition. The government has not pointed to a single decision in which an oral or written declaration made out of court has been deemed admissible substantive evidence against a defendant when the identity of the declarant has not first been established because no such holding exists.

For that reason, the testimony of the introduction witness, Wilkerson, was

insufficient for the admissibility purposes the government claims. Wlkerson's testimony was speculative on the point, suggesting the false information in the credit applications may have originated from either of three sources: 1) the customer providing the information to the salesman; 2) the salesman; or 3) some other person at the dealership with access to it.

Moreover, the presumption that the customer was the source of the falsity is particularly strong in Mugford's case. Each of the eleven "Mugford" credit applications was signed by the customer attesting that the information was accurate and complete.[5] Admitted for any purpose, on their face the applications

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[5] Each standard application form contained the following statement, immediately above a line for the customer's signature: "You certify that the above information is accurate and complete..."

purport to be the declarations of the customer, and Wilkerson's testimony supports that premise. None of the customers was indicted, and none of the nine whose credit applications relate to the convictions appealed were called to testify.

It logically follows that to be admissible as non-hearsay evidence, the relevance of each of the credit applications to the charges had to appear either on the face of the credit application itself or be shown by other evidence. The credit applications themselves were not sufficient for that purpose. Neither was Wilkerson's testimony alone, nor the remaining documents in the files.[6]

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[6] The government maintains the other documents in the file were admissible under Rule 803(6). These documents were not relevant evidence against Mugford for similar reasons as the credit

The appearance of his name as salesman in the nine documents was the only link between Mugford and the false statements in the credit applications forming the basis of his convictions. Had these documents not been admitted, or their use properly limited by the court, it would not have been possible for the jury to convict Mugford. Therefore, their admission without a limiting instruction [7]

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applications were not. Only Mugford's name in the documents linked him to them, nothing else. Given Wilkerson's testimony that the documents were prepared from the information on the credit application supplied by the customer, they contain inadmissible double hearsay.

The government's reliance on the similarity of the handwriting and signatures in the various papers to prove Mugford's involvement is inconsistent with its own concession that another salesman completed the Burns application, though the handwriting in all eleven has also been referred to by the government as "similar" and "distinct." Also, its own witness, Mosley, did not identify Mugford as the salesman with whom he dealt when afforded the opportunity at trial.

[7] *See* ***United States v. Evans***, 572 F.2d 455, 490 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978), *cited* at p. 8, Op.Br., holding that introduction of large groups of exhibits at once "not unfair"

was not harmless, but "particularly egregious," resulting in "a miscarriage of justice." *United States v. Olano*, 113 S.Ct. 1770, 1790 (1993); *United States v. Frady*, 456 U.S. 152, 163 & n.14 (1982).

II. *SIXTH AMENDMENT VIOLATIONS*

The government contends no Confrontation Clause issues exist because the credit applications were not used to prove the matters asserted, Mugford had the right to cross-examine the introducing witness, and the remaining file documents were properly admissible under Rule 803(6). Op.Br., pp. 11-13. Its reasoning is flawed because its supporting case authority does not apply to the facts of this case.

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when trial court made clear that introduction *en masse* was conditioned upon defense counsel's right to object at a later time to the admission of any specific document, and the jury was properly instructed as to the weight to be given to each such document.

First, the credit applications lacked the requisite "indicia of reliability" with which "firmly rooted" exceptions to the hearsay rule are clothed. These documents, the crucial evidence to the convictions, were *improperly admitted for that reason*.

Second, merely having the right to confront the introducing witness does not cure the problem raised here. Wilkerson's testimony did not link Mugford to the credit applications, to the falsification of them, or to the conspiracy itself. Moreover, Mugford did successfully refute Wilkerson's testimony in significant part. On cross examination, Wilkerson could not identify or produce (and neither could the government) the credit application to which he claimed he saw Mugford add a "creative" second job or income, nor could he place Mugford at the sales meetings

falsification was discussed. The government never referred either in argument or in closing to Wilkerson's "other evidence" in ascribing guilt to Mugford. The prosecution relied only upon the credit applications and the implied hearsay each contained.

This was exactly the question posed by the admission of 57 credit cards receipts in *State v. McGann*, 132 Ariz. 296, 645 P.2d 811 (1982). *See*, Pet., pp. 38-42, 46-47. Those credit card receipts also were admitted for the "falsity" of the information they contained (the customers' signatures) without the customer's testimony. The opposition brief avoids any reference to that holding; perhaps for the obvious reason that the Arizona Supreme Court found fundamental error affecting the defendant's right to confront the witnesses by the admission

(through a third party without first-hand knowledge of the fraud) of documents the accused may or may not have falsified. In ***McGann***, as in this case, the admission was wrongful for the hearsay implied in the documents. In both instances, the jury was allowed to infer improperly from the combination of two unrelated factors (the charge against the accused and the absent customer) that the accused falsified a document and violated the law. The result was more egregious in Mugford's case than in ***McGann*** because of the lack of "other evidence" of Mugford's wrongdoing.[8]

The "application of a recognized hearsay rule exception does not necessarily evidence compliance with the

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[8] In ***McGann*** there was testimony from a customer that the signatures on four other credit card receipts were not his, nor authorized by him. No such customer testimony existed in this case. Moreover, in this case, the two customers called by the government did not tie Mugford to the falsification of their credit applications.

Confrontation Clause." *United States v. Adams*, 446 F.2d 681, 683 (9th Cir.), *cert. denied*, 404 U.S. 943, 92 S.Ct. 294, 30 L.Ed.2d 257 (1971). Nor has this Court, as the government implies, held that admission under a well-recognized hearsay exception satisfies Confrontation Clause problems. In fact, this Court has expressly rejected such a construction.[9]

The fact remains that given the opportunity to cross-examine the customer witnesses about the source of the false information in their credit applications, Mugford was able to establish his innocence as to those transactions. His convictions flow from the nine instances

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[9] *See California v. Green*, 399 U.S. 149, 155-56, 90 S.Ct. 1930, 1934 (1970), wherein it is said, "Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. [citations omitted]"

in which he was not afforded that opportunity by the government.[10] Under such circumstances, the opposition's position that there are no Confrontation Clause issues raised is without merit.

III. *THE EVIDENCE WAS INSUFFICIENT*

As stated in page 1 & n. 1, *supra.*, there was no "other evidence" to support the convictions. The loan applications do not prove Mugford was the salesman

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[10] Because the burden is on the government to prove each and every element of the offense charged, ***Sullivan v. Louisiana***, 113 S.Ct.2078 (1993), requiring an accused to subpoena the hearsay declarant if the government does not produce him shifts the burden of proof to the defendant and is inconsistent with the constitution's "preference for face-to-face encounters at trial," ***Ohio v. Roberts***, 448 U.S. 56, 63 (1980). It is respectfully suggested the abuse of the business records exception in this case vindicates Judge Coleman's holding in ***Park v. Huff***, 493 F.2d 923, 933-934 (5th Cir.1974), ***reversed on rehearing en banc*** (six justices dissenting), 506 F.2d 849, ***cert. denied*** 423 U.S. 824 (1975), that "the burden of producing witnesses to meet the accused's right of confrontation falls on the State." Judge Coleman sagely reasoned that is the sure way to prevent the government from hiding a weak case and avoiding the risk the testimony of the declarant would exculpate the accused.

involved merely because his name appears on them as the salesman. ***United States v. Lieberman***, 637 F.2d 95 (2d Cir.1980). Recognizing this, the government called Burns and Mosley to prove Mugford falsified their credit applications and thereby lay a foundation to argue that he falsified the remaining nine, without having to call the other customers to testify.

The government admits its failure to prove not only Mugford's guilt on the Burns and Mosley applications, but even his connection to them.[11] Inexplicably, while conceding another salesman completed the Burns application, the government still maintains that the same, distinctive handwriting and signatures, appearing on all eleven credit applications (including

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[11] See footnote 2, page 6, Brief in Opposition.

Burns'), proved Mugford was the source of the false information on the remaining nine in which no customer testimony or other evidence was offered linking them to Mugford. Br.Opp., p. 14.

The contrary would appear to be proved by that admission, for if the same hand which wrote the Burns application wrote the remaining nine, it follows that Mugford did not write the nine at issue.

A reasonable jury, having found reasonable doubt that Mugford falsified the Mosley and Burns applications, was required to find reasonable doubt as to the other charges for which there was no other evidence presented.

CONCLUSION

The opposition's reliance on the admissibility of the credit applications and its contentions that "other evidence" existed to sustain the convictions are

specious, and inconsistent with the facts and of the applicable law. Petitioner's convictions of conspiracy and fraud were the result of the improper admission of the credit applications and other documents, the denial of his right to confront the customers in the nine transactions at issue, and the jury's impermissible inferences that were inconsistent with the evidence presented.

As a result, an innocent man was convicted of crimes he did not commit. For these reasons, the petition should be granted.

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